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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM 1972

No. .....

CHEMICAL CARRIERS, INC. and CHEMICAL TRANSPORTER INC.,
Petitioners,

against

MIRIAM GERTRUDE ANDREWS, Executrix of the Estate of RICHARD ANDREWS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause as amended on March 30, 1972.

Opinions Below

The opinion of the District Court for the District of Delaware, is not officially reported. It is reproduced in Appendix A.

The opinion of the Court of Appeals for the Third Circuit is reproduced in Appendix B.

The order amending the opinion of the Court of Appeals for the Third Circuit dated March 30, 1972 is reproduced in Appendix C.

The order denying the petition for a rehearing was entered March 31, 1972.

The opinion of the Court of Appeals for the Third Circuit, is reported at 457 F2d 636.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was made and entered on February 15, 1972, and amended pursuant to its order amending opinion dated March 30, 1972. The order denying the petition for rehearing was entered on March 31, 1972.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

1. Must an attorney argue the significance of each and every piece of evidence to the trial court or be barred from thereafter arguing its significance on appeal?

2. May a ship's officer who is charged with the responsibility for allocating work details and requesting sufficient crew members to perform said work, who knowingly and wilfully fails to request additional crew members in order to earn lucrative overtime pay and keeps for himself the extra work, then impute responsibility for the failure to have a sufficient crew to his employer as the basis for a recovery by him for injuries resulting from his voluntary assumption of extra work?

3. A ship's officer should have an absolute duty to disclose to his employer that he is suffering from a severely

debilitating disease, and the failure to disclose the existence of a disease should bar him as a matter of law from making claim upon his employer for injuries resulting therefrom.

Statement

Richard Andrews, the respondent's late husband, in early 1962 was serving as a third mate on a coastwise, oceangoing chemical tanker known as the SS CHEMICAL TRANSPORTER. He had been a licensed officer in the employ of the respondents for more than 5 years.

Unknown to Mr. Andrews' employer, he was suffering from a disease known as Menieres disease. He had been aware of the subjective manifestations of this disease for at least 8 months. Menieres disease causes dizziness, imbalance and loss of motor control. Mr. Andrews' widow testified that since October of 1961, while at home on leave, he suffered in her presence at least 3 episodes involving dizziness, loss of balance or loss of motor control. She stated that during these attacks he "wasn't able to function".

The last of these incidents occurred in May of 1962, just prior to Mr. Andrews' return to the SS CHEMICAL TRANSPORTER for the voyage here in question. On May 18, 1962, his personal physician, Dr. Hertzberger, in an attempt to control Mr. Andrews' loss of balance prescribed for Andrews a medicine known as "Antivert". Despite the fact Dr. Hertzberger never saw Andrews thereafter and never saw what affect the taking of "Antivert" had, he testified in 1969 (long after Andrews' death) that Andrews could have returned to work with "No restrictions. No difficulties." and he had "Recovered". The medical experts produced at the trial by Mr. Andrews' widow, without exception all testified that there is no known cure for Menieres disease and that it was frustrating and unpredictable to treat.

Upon his return to the vessel, on May of 1962 as the regular chief mate was on vacation Andrews assumed the duties of acting chief mate and as such was second in command. His duties as chief mate required him to allocate the work details, to request sufficient crew members to perform the work expected and to stand sea watch on the bridge. The vessel went into drydock on June 10th. The crew, including Andrews, was free to leave on that date. Andrews volunteered to remain on board and to work during this period. On June 14, 1962 he fell from a ladder and sustained the serious injuries which ultimately led to his death.

The respondent claims that on this voyage into drydock, due to an increase in the work, it was the custom and practice to have on board a fourth mate, and that because there was not on board a fourth mate, Andrews had to (1) supervise the tank cleaning operations, and (2) stand two 4-hour watches on the bridge each day navigating the vessel. The tank cleaning carried with it premium pay which was coveted by the mates and controlled by the chief mate. The petitioners vigorously contested the actual hours Andrews did work.

Andrews, as acting chief mate, was free to request a fourth mate if needed to assist him. The trial court found that "a reasonably prudent man in decedent's position would have requested a fourth mate rather than incur such extra work and would not have continued working after the termination of the voyage." It further found that the petitioners were negligent for not supplying a fourth mate. It allocated negligence, one-third to Andrews and two-thirds to petitioners.

The trial court found as a fact that Andrews, in addition to supervising the tank cleaning work, stood two 4-hour watches on the bridge each day and "as watch officer decedent was responsible for the navigation of the ship and had to stay on the bridge at all times during his shift."

If Andrews did not stand the two 4-hour watches, respondent's theory of overwork failed for it admitted Andrews be relieved only of watch standing had a fourth mate been on board.

The petitioner argued on the appeal that the trial court's finding that Andrews stood two 4-hour watches each day, was "clearly erroneous". In support of this claim petitioners pointed out to the Court of Appeals that during the period an officer is on watch, he is required to make entries in and initial the watch log. The log for the periods in which the trial court found Andrews to have stood watch, contains no initials and no entries made by him.

The Court of Appeals disposed of this argument with the following comment: "If it were not for the failure of respondents to present this argument to the district court, we might well be inclined to remand the case to the district court for reconsideration and amplification of its findings on this factual issue as presented by the record in this case." It then affirmed the findings of the trial court.

Reasons for Granting the Writ

I

The decision of the Court of Appeals creates a new legal prerequisite to an appeal which, in addition to being without legal precedent, creates an intolerable burden on lawyers and judges for it now requires a litigant must "argue" in the trial court the significance of each and every piece of evidentiary matter or be barred thereafter from relying upon said evidence in an argument presented to the Court of Appeals.

The Court of Appeals has confused "issue" with "argument". The issue in dispute was two-fold and neither was abandoned by petitioners. It was first, did Andrews overwork and second, if so was it voluntary.

The petitioners in the trial court took issue with the statements of two witnesses (one of whom testified by deposition), who testified on behalf of Andrews with respect to the number of hours he spent tank cleaning and the amount of time he spent on watch. The tank cleaning records contradict the enormous number of hours these two witnesses claimed were spent by Andrews tank cleaning. Further neither was in a position to see if he did or did not stand watch.

Andrews could not be engaged in tank cleaning at the same time he was on watch on the bridge navigating the vessel. They were mutually exclusive.

After the trial court concluded Andrews had stood two 4-hour watches, petitioners on appeal pointed out that during the period the trial court found he was in fact on watch Andrews never signed or made an entry in the log as watch standing officer. It was petitioners' contention that written records made contemporaneous with events and prior to the injection of a motive to falsify or exaggerate (Andrews' fall), which indicate that he did not stand watch, required the Court of Appeals to reverse the trial court on this critical finding. *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 at 766.

The Court of Appeals has recognized that in all probability Andrews did not in fact stand the watches. Its refusal to reverse on this issue, which is critical to respondent's theory of liability for it concedes that the mere supervising of the tank cleaning does not constitute overwork and claims only that he was overworked because he had, in addition, to stand watch for two 4-hour periods each day. The issue then is overwork. The cases cited by the Court of Appeals for the Third Circuit do not require as a prerequisite to the discussion of a fact in the Court of Appeals, that it have been fully discussed during written or oral arguments in the trial court. Absent a stipula-

tion of fact, it is for the trial court to weigh all of the evidence in its resolution of the issues in litigation.

- *Marcopa County* v. *American Pipe & Const. Co.*, 431 F.2d 1145 (9th Cir. 1970);
  Wisconsin Barge Line, Inc. v. *Coastal Marine Transport, Inc.*, 414 F.2d 872, 875-76 (5th Cir. 1969);
  Drop Dead Co. v. *S. C. Johnson & Sons, Inc.*, 326 F.2d 87 (9th Cir. 1963), cert denied, 377 U.S. 907 (1964);
  Roberts v. *United States*, 316 F.2d 489, 497 (3rd Cir. 1963);
  Cf. *United States* v. *Grosso*, 358 F.2d 154, 158 (3rd Cir., 1966); rev'd on oth r grounds, 390 U.S. 62 (1968).

The issue was "overwork", not the significance of each and every item of evidence. So long as the issue is contested, the issue may be raised and must be dealt with appropriately by the Court of Appeals.

II

May a licensed officer in charge of the allocation of work details purposely not request additional help from his employer in order to keep for himself the lucrative overtime pay arising out of the absence of an additional mate, then make claim upon his employer, alleging the extra work caused him to become tired and trigger a latent disease.

Andrews was the acting chief mate on the SS CHEMICAL TRANSPORTER. As such he was in charge of requesting and securing a crew adequate to perform the work to be expected. The failure to request an extra mate permitted Andrews to keep for himself, at a higher premium pay rate, the supervision of tank cleaning. The trial court and the

Court of Appeals found that Andrews was negligent in not requesting a fourth mate to assist him. It then imputes the negligence of Andrews in not securing an adequate crew to his employer and finds Andrews is entitled to recover from his employer for the injuries allegedly brought about by the absence of a fourth mate.

The Court of Appeals has found that Andrews created a condition upon which he relied as the basis for his claim of negligence against his employer. Petitioners allege that as a matter of law Andrews is not entitled to recover against his employer for injuries arising from his own negligent acts.

It is not disputed that had Andrews requested a fourth mate, one would have been supplied. The trial court and the Court of Appeals have found as much. It was Andrews, the chief mate, who knew what work needed to be done, not his employer in some shore side office.

Further, Andrews was free to leave the vessel at least 3 days prior to his fall. His employer did not know he was suffering from a disease causing dizziness, loss of balance and motor control. He, allegedly fatigued, volunteered to stay. Andrews, as acting chief mate, controlled his own fate. He should not be able to permit the vessel to operate without a fourth mate, keep for himself the more lucrative work, voluntarily stay on board the vessel and then use the combination of said acts as a basis for recovery against his employer.

The Courts of Appeals and the Supreme Courts have long since found that where a condition is created by the seaman, he is not entitled to be compensated. *Carleno* v. *Marine Transport Lines, Inc.*, 209 F. Supp. 859 (E.D. Va. 1962), aff'd; 317 F. 2d 662 (4th Cir. 1963), cert. denied 375 U.S. 896 (1963). *Holmes* v. *Mississippi Shipping Co.* 301 F2d 474 (5th Cir. 1972), cert. denied 371 US 802 (1962) *Williams* v. *SS Richard de Larrinaga*, 287 F2d 732 (4th Cir. 1961).

III

May a ship's officer knowingly and wilfully conceal from his employer a debilitating physical condition for which there is no known cure, and thereafter use it as the basis for a recovery against his employer for injuries sustained by him.

Andrews was suffering from fainting, dizziness and loss of balance. The medical experts at the trial testified it was Meniere's disease.

Dr. Hertzberger defined Meniere's disease as follows:

> "Meniere's disease is a very indefinite syndrome, characterized by ringing in the ears, sometimes dizziness, sometimes not. Its cause is not definitely known. We know what it is. It is a collection or increase in fluid pressure of the fluid in the semi circular canals. Why it occurs nobody knows . . .".
>
> "It varies tremendously. Sometimes it is very brief, a small, slight attack. Other times the attack will last for some time or reoccur. There is no rhyme or reason to it. Unfortunately it is a very indefinite sort of disturbance."

Dr. Hertzberger was further asked the following question and gave the following answer:

> "Q. I gather to this day even in the profession, somewhat mysterious? A. It is, indeed."

Dr. Max Lee Ronis, one of plaintiff's non-treating professional witnesses, described Meniere's disease as follows:

> "It is generally accepted that Meniere's disease syndrome, is precipitated by stress, physical and/or emotional stress."
>
> "It may be hours to several days before the end result of the stress manifests itself in the symptoms that the stress produces."

> "... Meniere's syndrome, ... is characterized by a tirade of symptoms, of tinnitus, hearing loss and dizziness or vertigo."
>
> "It is unpredictable to physicians generally because the stress which precipitates the attack is very often not understood. It could be on a psychological basis or a physical basis."

And then, assuming his conclusion,

> "The fact that we call it unexplained merely attests to our inability to understand all the factors that might be going on in the particular individual."

Dr. Halbert Fillinger, the second of plaintiff's non-treating professional witnesses, a specialist in forensic pathology, described Meniere's disease as follows:

> "It is really a syndrome more than disease, your honor, with a variation in presentation of symptoms. Primarily it consists of dizziness, often momentary weakness; it may result in severe headaches; it is associated with ringing of the ears; it is frequently a problem of balance and general motor coordination."

Dr. Fillinger described the inability of the medical profession to treat Meniere's disease as follows:

> "Its exact cause is not fully understood. It is a symptom which presents itself and regresses. The person may have symptoms of Meniere's disease. He may improve with or without therapy, and then it may reoccur. It is an ungratifying disease to treat because of this. It may be severely incapacitating and it may be only transitorily so."

Andrews was an experienced, licensed ship's officer. He was aware, at least since October of 1961, that he was suffering from a condition that caused him to faint, lose his balance and motor control. At no time did he seek free

medical treatment from the experienced doctors at a U.S. Public Health Service Hospital to which he was entitled as a matter of law. *Cossack* v. *United Fruit Co.*, 365 US 731 (1961). It is clear that had he done so his condition would have become a matter of medical record and his employer informed of said fact on the medical report of duty status promulgated under 42 Code of Federal Regulations, Chapter 32. By going to a family doctor this report was not made out.

Petitioners are the owners and operators of the vessel. They must rely upon the ship's officers to exercise responsibility and a high degree of care in the exercise of their duties. It is petitioners' contention that a ship's officer should be required to reveal to his employer physical infirmities which may preclude him from performing his duties and the failure to do so is negligence as a matter of law.

Petitioners assert that with respect to a ship's officer, particularly one entrusted with navigation, the failure to disclose a potentially debilitating disease, is negligence as a matter of law.

The failure of the trial court and the Court of Appeals to find negligence on the part of Andrews for this concealment is contrary to the decisions of other Courts of Appeals. See *McCorpen* v. *Central Gulf S.S. Corp.*, 396 F2d 547 (5th Cir. 1968), and the authorities cited therein.

More importanly, petitioners urge that this court should enunciate a new standard whereby a licensed officer should be held to an absolute duty to reveal to his employer that he is suffering from a debilitating disease.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A.

Opinion of the District Court.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

IN ADMIRALTY No. 1844

MIRIAM GERTRUDE ANDREWS, Executrix of the Estate of RICHARD ANDREWS,

Libelant,

v.

CHEMICAL CARRIERS, INC. and CHEMICAL TRANSPORTER, INC.,

Respondents.

Arthur Inden, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; and Marvin I. Barish, of Freedman, Borowsky and Lorry, Philadelphia, Pa., of counsel, for libelant.

William E. Wiggin, of Richards, Layton & Finger, Wilmington, Delaware, for respondents.

OPINION

Wilmington, Delaware
June 19, 1970
WRIGHT, CHIEF JUDGE.

Appendix A.

I.

This action was brought in admiralty by Richard Andrews, third mate aboard the S.S. Chemical Transporter, against the owners and operators of the vessel to recover damages for personal injuries allegedly caused by the unseaworthiness of the vessel and the negligence of respondents. Upon the death of libelant, Miriam G. Andrews, his wife and executrix of the estate, was substituted as libelant.

Jurisdiction in admiralty exists, as alleged, under the Jones Act, 46 U.S.C. § 688 *et seq.*, as that act amends and supplements the general maritime law.

In accordance with the terms of the pretrial order, libelant abandoned certain theories of unseaworthiness and negligence asserted in the pleadings and proceeded at trial solely on the theory that inadequate manning of the vessel, resulting in excessive work for decedent, constituted both unseaworthiness and negligence.

II.

At all material times, Richard Andrews was employed by respondents as third mate and relief chief mate aboard the S.S. Chemical Transporter, a tank vessel engaged in the coastal transportation of chemicals.

Once every year the S.S. Chemical Transporter went into drydock for its annual overhaul and inspection. At approximately 8:18 a.m. on June 7, 1962, the vessel left New Haven, Connecticut, to go into drydock at the Baltimore shipyard, where it arrived about midnight of June 9, 1962.

Since all tanks aboard the vessel had to be clean and gas-free in order to pass inspection by shipyard officials, it was standard procedure for the crew of the S.S. Chemical Transporter to begin tank cleaning when the vessel left New Haven on her voyage to drydock. Because of the extra work involved in preparing the ship for drydock, the vessel usually carried four mates instead of the normal

three. This practice of carrying a fourth mate when the vessel was to enter drydock was the established custom and practice in the coastwise trade for a vessel such as the S.S. Chemical Transporter.

However, because of the ship's rotation system, the chief mate Moller was on vacation during the trip from New Haven to Baltimore in June 1962, leaving only three mates aboard the vessel. Although Moller had given the company three month's notice of his vacation and had informed the captain of his departure, no one requested him to remain aboard for the last trip into drydock. The captain did not attempt to obtain a fourth mate by asking Moller to remain or by contacting the union, which could have supplied a mate upon request.

Tank cleaning operations were conducted throughout the voyage until 6:00 a.m. June 10th, when the inspectors boarded the vessel at the Baltimore shipyard. Tank cleaning is a strenuous operation and is accomplished with the aid of a "butterworth" machine. A butterworth machine is a bronze device, weighing approximately 25 to 30 pounds, with a hose attached. When lowered into a tank, the machine rotates by ejecting hot water under high pressure.

As acting chief mate in Moller's absence, decedent was required to supervise tank cleaning operations. Decedent also participated in the actual cleaning of the tanks, which included climbing down into the tanks to inspect them when butterworthing was completed and helping to move the hose and butterworth machine.

In addition, decedent had to stand watch during this period. A regular watch consisted of two four hour shifts a day. As watch officer, decedent was responsible for the navigation of the ship, and he had to stay on the bridge at all times during his shift. Had there been four mates aboard, decedent would not have been required both to stand watch and supervise tank cleaning. Decedent also performed certain administrative duties, such as verifying

and recording overtime of the crew, supervising the discharge of cargo and the mooring of the vessel.

Although he appeared fatigued and told a member of the crew that he was glad the trip was over so that he could relax, Andrews elected to continue work in drydock. On June 14, 1962, while climbing a ladder aboard ship, he fell backwards sustaining craniocerebral injuries. He died of bronchopneumonia on October 7, 1964, as a result of those injuries.

Prior to this voyage decedent suffered three separate incidents of dizziness, mild deafness and ringing in the ears in October 1961, February 1962 and May 1962. On May 18, 1962, he consulted a doctor regarding these symptoms. The doctor examined him and diagnosed "slight Meniere's disease," annoying but not disabling. The physician prescribed medication but he said that decedent was able to perform his work without restriction or difficulties. Decedent did not inform respondents, the captain of the vessel nor any of its crew of his disease, nor did decedent ask the captain to obtain a fourth mate for the voyage into drydock.

Expert medical testimony established that the fall was caused by the Meniere's disease syndrome which was activated by the stress decedent experienced while working aboard the vessel and that but for the extra work and resulting stress decedent probably would have continued in a relatively asymptomatic state.

III.

The action of libelant, as executrix, embraces two claims, both of which originate from the same wrongful act.[1]

---

[1] The Jones Act, 46 U.S.C. § 688 *et seq.*, provides the same remedy for injury or death for all seamen that is provided for railroad workers under the Federal Employers' Liability Act (FELA),

(*footnote continued on following page*)

One is for the wrong to the decedent and is confined to his personal loss and pain and suffering before he died. The other is for the wrong done to the beneficiaries, the decedent's widow and his two children, who are entitled to recover the pecuniary loss which they sustained through the death of the decedent. St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U.S. 648, 658 (1915), quoted with approval in Van Beeck v. Sabine Towing Co., 300 U.S. 342, 347 (1937). Two theories of liability were advanced in support of these claims: unseaworthiness and negligence.

Prior to the recent decision by the Supreme Court in Moragne v. States Marine Lines, Inc., —— U.S. ——, 38 U.S.L.W. 4498 (June 15, 1970), libelant had no right of action for Andrew's death if it resulted from unseaworthiness alone. Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). The Harrisburg, 119 U.S. 199 (1886). The Court reached its result in the instant case, therefore, without consideration of the vessel's seaworthiness. *Moragne* does not change that result, since the evidence establishes respondents' negligence, and since, under either theory, the

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(*footnote continued from preceding page*)

45 U.S.C. §§ 51-60. Section 688 provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Section 1 of the FELA, 45 U.S.C. § 51, which defines the scope of liability under the Jones Act, permits recovery for wrongful death. Section 9 of the FELA, 45 U.S.C. § 59, provides for the survival after death of the seaman's negligence claim.

damage award must be reduced by an amount proportional to the degree to which decedent's negligence operated to cause the accident. Pope & Talbot v. Hawn, 346 U.S. 406, 408-09 (1953); 2 M. Norris, The Law of Seamen § 627 (2d Ed. 1962).

Prerequisites for recovery under 46 U.S.C. § 688 are: (1) that decedent was employed by respondents, (2) that decedent was a seaman on a vessel owned or operated by respondents and over which respondents had command, and (3) that respondents, or one for whom they were responsible, were guilty of negligence proximately causing the fatality. Savard v. Marine Contracting Inc., 296 F. Supp. 1171, 1177 (D. Conn. 1969). The only issue disputed at trial is whether respondents were negligent.

Negligence under the Jones Act has been defined as "a failure by defendant to observe the degree of care required under the circumstances." Potter Title & Trust Co. v. Ohio Barge Line, Inc., 184 F.2d 432, 433 (3d Cir. 1950), *cert. denied,* 340 U.S. 955 (1951). The nature of the business and the dangers involved determine the amount of care required in any particular case. The test for determining whether the care used is proper and commensurate with the danger is the supposed conduct of the reasonably prudent man. See Roberts v. United Fisheries Vessels Co., 141 F.2d 288, 291 (1st Cir. 1944), *cert. denied,* 323 U.S. 753 (1944).

It has often been held that the concept of negligence under the Jones Act should be liberally construed since "it is not the relatively narrow common law concept of negligence, but a more liberal one commensurate with the broad remedial purposes of the Federal Employers' Liability Act and the Jones Act." Forgione v. United States, 202 F.2d 249, 252 (3d Cir. 1953), *cert. denied,* 345 U.S. 966 (1953); see Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 375 (1932); Jamison v. Encarnacion, 281 U.S. 635, 640 (1930).

The failure to provide sufficient manpower to perform a job constitutes negligence. Compare Rosenquist v. Isthmian S.S. Co., 205 F.2d 486 (2d Cir. 1953); Gold v. Groves, 182 F.2d 767 (3d Cir. 1950).

In light of the established custom and practice in the trade for a tanker such as the S. S. Chemical Transporter to carry four mates on its voyage into annual drydock, a practice usually followed by the S.S. Chemical Transporter, the Court concludes that a complement of three mates was inadequate. In view of the extra work that had to be performed on this particular trip, a fourth mate was necessary to insure a safe and equitable distribution of the workload.

The failure to assign a fourth mate to the S.S. Chemical Transporter was a breach of the duty to observe the care required under the circumstances. The breach of this duty was the proximate cause of the injury and death of decedent. Respondents must be charged with this negligence because they knew or should have known that the vessel was undermanned: they were aware a year in advance that the vessel would go into drydock and had ample notice that Moller's vacation would coincide with this event. Respondents also had notice of the amount of work required on the voyage immediately preceding the annual drydock, and should have known that the absence of a third mate would cause the chief mate to sustain a workload potentially inimical not only to his own safety but to that of the ship and crew. The Court finds therefore that respondents were negligent and that their negligence was a proximate cause of the accident and resulting injury and death.[2]

---

[2] Negligence cannot be predicated, as suggested by libelant, upon a violation of 46 U.S.C. § 235 since it was not established (1) that the captain permitted decedent to take charge of the deck watch upon leaving or immediately after leaving port without decedent's having had at least six hours off duty immediately preceding the time of sailing or (2) that decedent was required to do duty to exceed nine hours of any twenty-four while in port, including the date of arrival, or more than twelve hours of any twenty-four at sea.

Although contributory negligence is not a bar to an action under the Jones Act, the doctrine of comparative negligence applies to reduce the amount of any damage award in the proportion by which decedent's fault contributed to his injuries and death. The Court must therefore consider whether decedent was himself negligent and whether his negligence was a proximate contributing cause of the accident.

Shortly before he shipped out, decedent suffered his third episode of dizziness, deafness and ringing in the ears, which symptoms were diagnosed as Meniere's disease. He was treated by a doctor who pronounced him fit to continue his work. Decedent engaged in the physically taxing work of tank cleaning, though his responsibility as acting chief mate was merely to supervise and assist. Despite his awareness of the customary crew complement, evidenced by a remark to another crew member that more help was needed, he did not request a fourth mate. Although decedent appeared fatigued and stated that he was glad the voyage was over so that he could relax, he volunteered to work in drydock.

A reasonably prudent man in decedent's position would have requested a fourth mate rather than such extra work and would not have continued working after the termination of the voyage. The Court is not prepared to hold, as libelant urges, that one who voluntarily undertakes strenuous work over long hours shall be blameless for the effects of his own exhaustion. Decedent's partial responsibility for the accident and the resulting injuries and ultimate death must cause the award of damages hereinafter determined to be reduced by one third.

IV.

The personal loss of the decedent consists of the following elements: (a) medical and funeral expenses, (b) pain

and suffering and (c) loss of earnings between date of the accident and date of death.

Decedent's medical and funeral bills amounted to $1,944.85.

For the two and one-third years between the accident and his death, decedent endured unrelieved physical and psychological torment. He was taken immediately to the South Baltimore General Hospital, where he remained unconscious for a month. He developed difficulty in breathing and the doctors performed a tracheotomy. He was removed to the U.S. Public Health Service Hospital in Baltimore on July 17, 1962, where he regained consciousness in September. He continued to have difficulty breathing and suffered a heart block. He developed acute dryness in his left eye as a result of his inability to close the lid, and his eye was sewn shut.

Decedent's cerebral injuries caused a complete paralysis. Although he was able partially to reduce the paralysis by physical therapy and he progressed to the point where he could walk between side rails, he never regained the ability to speak. He responded to communications by a squeeze of the hand and incomprehensible gutteral sounds. He apparently understood his condition, and it caused him visible anxiety and anguish.

He was released from the hospital in Baltimore in October 1963, and permitted to go home with his wife, a nurse. After four days at home, she concluded that it was impossible for him to remain there. He became violent and destructive and prevented his family doctor from approaching or examining him.

Seeking more intensive care, she sought to have him admitted to the Public Health Service Hospital in Boston. After considerable argument, during which decedent lay on a stretcher within view and hearing, the hospital admitted him. He was subsequently transferred to a rehabilitation hospital, from which he was discharged after four days as

not subject to rehabilitation. He spent the remainder of his life in the Connecticut State Mental Hospital at Norwich, where he died in October 1964, of pneumonia.

Upon the foregoing facts, the Court concludes that an award of $100,000.00 for pain and suffering is appropriate.

Decedent was injured on June 14, 1962, and he died on October 7, 1964. In 1961, the last full year before his accident, he earned $15,998.93. His federal income tax amounted to $2,932.10. His net earnings were thus $13,066.83. Petition of Oskar Tiedeman & Co., 236 F.Supp. 895, 906-07 (D.Del. 1964). Taking this figure as the annual base wage, decedent would have earned approximately $30,446.00 in the two and one-third years between his accident and his death. His net loss of earnings is therefore $30,446.00.

V.

The loss to the beneficiaries consists of compensation for deprivation of the reasonable expectation of pecuniary benefits that decedent would have provided had his life not been shortened by the accident. The amount of contributions by the decedent during his lifetime has a direct bearing on such reasonable expectation. Cleveland Tankers, Inc. v. Tierney, 169 F.2d 622, 624 (6th Cir. 1948).

The age of the beneficiaries and of the decedent at the time of his death, their health, financial condition and relationship are intangible factors to be weighed also in any determination of the value of the reasonable expectation of pecuniary benefits from the decedent. Wade v. Rogala, 270 F.2d 280, 285 (3d Cir. 1959).

At the time of his accident, decedent suffered from Meniere's disease and had had three attacks within the nine months prior to the accident. He was otherwise in excellent physical health, and according to Dr. Fillinger he would have experienced no shortening of his life ex-

pectancy, which was 23.1 years at the time of his death. It is of course possible that illness would have shortened his working days. It is equally possible, in fact more likely, that he would have received promotions and increased wages.[3] They are imponderables upon which the Court

Decedent turned over to his wife all his earnings with the exception of $540 per year, which he retained for his personal needs. Those needs decreased by $300 the year of his death, because in that year the obligation to support a minor child by a previous marriage terminated, the child having reached majority. Thus libelant might reasonably have expected to receive $15,758.93 per year, the difference between the base wage of $15,998.93 and $240. She is entitled to compensation for the loss of her reasonable expectation of receiving that sum for the years decedent would reasonably be expected to earn it, i.e., until he was 65. In calculating her loss, income taxes paid by decedent will not be considered.[4]

This amount must be reduced to present value by application of a discount rate of 4%. The portion of the amount which represents loss of benefits prior to trial shall not be reduced by application of the discount rate, however. See Mascuilli v. United States, 411 F.2d 867, 872 (3d Cir. 1969).

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[3] In the seven years since the accident, wages for a third mate have increased from $29.10 per day to $36.70 per day. Wages for a chief mate have increased from $34.41 per day to $42.58 per day. will not speculate.

[4] The authorities are divided on whether income taxes should be subtracted from expected earnings in calculating loss of benefits to beneficiaries following a decedent's death. See, as favoring the deduction, Southern Pacific Co. v. Guthrie, 180 F.2d 295, 302 (9th Cir. 1949), *cert. denied* 341 U.S. 904 (1951). *Contra* Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308, 314 (2d Cir. 1964); Phoenix Indemnity Co. v. Givens, 263 F.2d 858, 863 (5th Cir. 1959).

Libelant is also entitled to recover for herself and her two minor children a sum for past and future loss of decedent's services, guidance, and care, if they are capable of pecuniary evaluation. The record does not establish the value, if any, of such services, guidance, and care, and the Court declines to make any award for those factors. See Michigan Central R.R. v. Vreeland, 227 U.S. 59, 73-74 (1913).

The parties are required to calculate the damages allowed by this opinion and to reduce the total amount by one-third. Upon receipt and approval of that calculation, the Court will enter a judgment for libelant.

The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure.

Wilmington, Delaware
June 19, 1970

APPENDIX B.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-1008 and 71-1009

MIRIAM GERTRUDE ANDREWS, Executrix of the Estate of RICHARD ANDREWS,

v.

CHEMICAL CARRIERS, INC., and
CHEMICAL TRANSPORTER, INC.

CHEMICAL CARRIERS, INC.,
Appellant in No. 71-1008
CHEMICAL TRANSPORTER, INC.,
Appellant in No. 71-1009

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
Argued December 16, 1971
Before BIGGS, VAN DUSEN, and HUNTER,
Circuit Judges

OPINION OF THE COURT

(Filed February 15, 1972)

VAN DUSEN, *Circuit Judge.*

This is an appeal from a decision and order of the District Court for the District of Delaware (sitting in ad-

miralty) requiring Chemical Carriers, Inc. and Chemical Transporter, Inc. to pay damages in the amount of $221,335.47 to Miriam Gertrude Andrews, Executrix of the Estate of Richard Andrews. The action was brought by Richard Andrews on March 4, 1963, pursuant to the Jones Act, 46 U. S. C. § 688 et seq., to recover damages for injuries received by him on June 14, 1962, which caused his death on October 7, 1964.[1] The district court found that the respondents had been negligent in failing to provide sufficient manpower during a June 7-10, 1962, voyage into drydock at the Baltimore, Maryland, shipyard and that this negligence was the proximate cause of the injury and death of Andrews. The district court also found that Andrews himself was negligent in failing to request additional manpower during the voyage and in continuing to work after the ship arrived in drydock on June 10, 1962; the award of damages was reduced by one-third to reflect the district court's assessment of Andrews' comparative negligence. The respondents appeal from the district court decision. For the reasons to be stated, we have concluded that the arguments advanced by the respondents on appeal are unpersuasive and affirm the judgment of the district court. After careful consideration, we find that none of the pertinent findings of the district court which are subject to review on these appeals, including those discussed below, are clearly erroneous. See F. R. Civ. P. 52(a); *McAllister v. United States*, 348 U. S. 19 (1954); *Petition of M & J. Tracy, Inc.*, 422 F.2d 929, 931 (3rd Cir. 1969.)[2]

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[1] After Andrews' death, Miriam Gertrude Andrews, his wife and the executrix of his estate, was substituted as libellant.

[2] See *United States v. United States Gypsum Co.*, 333 U. S. 364, 394-95 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."). It is not our province to state whether we would have made the findings included in the district court opinion.

Appendix B.

The focal point of this case is the June 7 to June 10, 1962, voyage of the S. S. Chemical Transporter—a tank vessel engaged in the coastal transportation of chemicals—into the Baltimore, Maryland, shipyards for its annual inspection and overhaul. Andrews, while normally the third mate aboard the vessel, served as acting chief mate during this voyage because the regular chief mate was on vacation. Although in most cases the vacancy created by a mate's vacation would not be filled and the S. S. Chemical Transporter would normally carry three mates (including the chief mate), there was evidence to support the district court's finding that on the voyage into drydock in preparation for the annual inspection of the tanks by shipyard officials, it was the established custom and practice in the coastal trade for a vessel to carry all four mates (the normal complement) because of the extra work involved in supervising the tank cleaning operations carried out by the crew. On the June 7-10, 1962, voyage of the S. S. Chemical Transporter into drydock, however, a fourth mate was not provided. The district court found that, as a result of this undermanning, Andrews, as acting chief mate, was required to both supervise the tank cleaning operations and stand his regular watch of eight hours per day. The district court also found that the stress resulting from this extra work activated a Meniere's disease syndrome which Andrews had suffered in the past, which caused Andrews to fall off a ladder aboard ship on June 14, 1962, sustaining craniocerebral injuries which resulted in his death on October 7, 1964.

Respondents argue that even if they were negligent in failing to provide a fourth mate during the June 7-10, 1962, voyage into drydock,[3] the determination of the dis-

[3] Although there is a suggestion by the respondents that this finding of negligence for their failure to provide a fourth mate is not supported by the record, the record requires the rejection of this contention.

trict court that this negligence was the proximate cause of Andrews' injuries is erroneous as a matter of law either (a) because Andrews could have avoided the overwork and resulting stress which caused his injuries by delegating supervision of the tank cleaning operations to one of the many others on board who were qualified to do this work, or (b) because had Andrews not concealed from respondents his several experiences of dizziness, mild deafness and ringing in the ears, which a doctor had diagnosed as "slight Meniere's disease" on May 18, 1962, he would not have been even permitted to serve on board the S. S. Chemical Transporter, much less perform the work that resulted in his injury and death. However, on the first issue, the district court found that "as acting chief mate . . . decedent [Andrews] was required to supervise tank cleaning operations" and this finding is adequately supported by the record. On the second point, although the district court made no finding regarding an intentional concealment and no conclusion regarding a negligent concealment, the respondents were not thereby prejudiced because the refusal of the district court to find on this record that this concealment was the sole proximate cause of Andrews' injuries is not clearly erroneous since respondents have cited no record support for the proposition that Andrews would not have been permitted to serve on board or to perform his June 7-10, 1962, work had respondents been made aware of Andrews' condition (see Reply Brief at 20). Accordingly, we reject these arguments advanced by the respondents.

Respondents also maintain that the written log entries, pay records and tank cleaning reports contradict the less reliable oral testimony that during the June 7-10, 1962, voyage Andrews stood his regular watches, in addition to supervising the tank cleaning work,[4] and that therefore

[4] Respondents argue that an examination of the log book of the S. S. Chemical Transporter (PX-1) reveals that it was the cus-

(*footnote continued on following page*)

the basis of Andrews' claim of stress brought on by required and unusual overwork is completely undermined. If it were not for the failure of respondents to present this argument to the district court,[5] we might well be inclined to remand the case to the district court for reconsideration and amplification of its findings on this difficult factual issue as presented by the record in this case. *Cf. Roeder v. Alcoa Steamship Co.*, 422 F.2d 971, 973-74 (3rd Cir. 1970); *Simpson v. Union Oil Co.*, 411 F.2d 897, 900 n. 2 (9th Cir. 1969). However, there was oral testimony to support the

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(*footnote continued from preceding page*)

tom and practice of the watch standing officer (Andrews included) to make various entries and initial each watch stood, but that in the period June 7 through June 10, 1962, Andrews made no factual entries and never entered his initials as the watch standing officer; instead, all of the entries and initials entered during this period are those of Wathne and Mollevik, the other two mates aboard. Also, the tank cleaning reports for the June 7-10, 1962, period and the pay records for this period are consistent with Andrews not having stood his regular watches during this voyage (see PX-3, PX-4, DX-2).

The evidence that Andrews did in fact stand his regular watches during this June 7-10, 1962, period consisted primarily of the testimony of two crew member friends of Andrews given more than five and seven years, respectively, after the June 14, 1962, accident (see the testimony of Rios and Linneman at 15a, 17a, 54a, 61a-62a). Captain Evans, who commanded the S. S. Chemical Transporter during the month of June 1962, also testified in December of 1969 that Andrews stood watch during the June 7-10, 1962, voyage, although he could not say how frequently he stood watch and thought that Andrews was relieved for four of his normal eight hours per day by the other two mates on board (see 203a, 265a-266a).

[5] The argument was not made in any brief filed before the district court (including Defendants' Post-Trial Memorandum (Docket No. 69)); it was not made in respondents' Proposed Findings of Fact and Conclusions of Law (Docket No. 72); and it was not made at the oral argument held on January 29, 1970, before the district court (see Docket No. 79, N. T. 33, 37-38, 39-40, 43-44). Indeed, this argument was only first advanced in this court in the Reply Brief filed by respondents.

finding of the district court on this point,[6] and we believe that sound principles of judicial administration preclude this court from considering arguments on issues of fact not raised or presented to the district court. *See, e. g., Maricopa County v. American Pipe & Const. Co.*, 431 F.2d 1145 (9th Cir. 1970); *Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc.*, 414 F.2d 872, 875-76 (5th Cir. 1969); *Drop Dead Co. v. S. C. Johnson & Sons, Inc.*, 326 F.2d 87 (9th Cir. 1963), *cert. denied*, 377 U. S. 907 (1964); *Roberts v. United States*, 316 F.2d 489, 497 (3rd Cir. 1963); *Cf. United States v. Grosso*, 358 F.2d 154, 158 (3rd Cir. 1966), *rev'd on other grounds*, 390 U. S. 62 (1968). Thus, respondents' argument on this issue is rejected.

Respondents also argue that the district court's reduction of damages by one-third due to Andrews' own negligence is grossly inadequate and fails to reflect the comparative degrees of negligence. The record requires the conclusion, however, that the district court's determination of this issue is justified by the record.

The remaining arguments advanced by respondents have been considered and are rejected.

Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[6] See n. 4, *supra*.

APPENDIX C.

Order Amending Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-1008 and 71-1009

MIRIAM GERTRUDE ANDREWS, Executrix of the Estate of RICHARD ANDREWS,

v.

CHEMICAL CARRIERS, INC., and
CHEMICAL TRANSPORTER, INC.

CHEMICAL CARRIER, INC.,
Appellant in No. 71-1008
CHEMICAL TRANSPORTER, INC.,
Appellant in No. 71-1009

Present: BIGGS, VAN DUSEN and HUNTER, *Circuit Judges.*

ORDER AMENDING OPINION

It is ORDERED that footnote 5 of the February 15, 1972, slip opinion is amended to read as follows:

> 5. The respondents did argue before the district court that Captain Evans' testimony indicated that Andrews was relieved for a portion of his regular watches during the June 7-10, 1962, voyage. Thus, at

the January 29, 1970, oral argument before the district court, respondents' attorney declared:

> "There is also testimony by the captain that not only would he [Andrews] have been relieved from tank cleaning and permitted merely to stand watch, but *he was also actually relieved for approximately two hours a day on watch standing.* This is another example of the way the time the man has spent has been sort of puffed up." (Emphasis added.)

(Document No. 79, N. T. 43-44).

But at no time before the district court did respondents either argue that Andrews stood none of his watches during the June 7-10, 1962, voyage or direct the district court's attention to the log book of the S. S. Chemical Transporter (which was available and introduced into evidence before the district court) in support of this claim as they do now before this court. These arguments were not made in any brief filed before the district court (including Defendants' Post-Trial Memorandum (Document No. 69)); they were not made in respondents' Proposed Findings of Fact and Conclusions of law (Document No. 72)-; and they were not made at the January 29, 1970, oral argument (see Doc. No. 79; N. T. 33, 37-38, 39-40, 44). Thus, at the January 29, 1970, oral argument, the attorney for respondents declared immediately after his reference (quoted above) to Captain Evans' testimony that Andrews was relieved from some of his watch duties: "I think truly that he [Andrews] did put a great deal of time in on this voyage, but I do think also he did put it in electively" (Doc. No. 79, N. T. 44). Indeed, these claims were only first advanced in this court by the Reply Brief filed by respondents. It seems clear from the record in this case that the respondents, having failed

in their defense arguments presented to the district court initially, have now on appeal advanced arguments which could have been, but which were not, addressed first to the district court. Under these circumstances, we reject respondents' suggestion that the case be remanded to the district court on this issue.

By the Court:—

Francis L. Van Dusen
Circuit Judge

Dated: March 30, 1972.

APPENDIX D.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-1008 and 71-1009

MIRIAM GERTRUDE ANDREWS, Executrix of the Estate of RICHARD ANDREWS

vs.

CHEMICAL CARRIERS, INC. and CHEMICAL TRANSPORTER, INC.

CHEMICAL CARRIERS, INC.,
Appellant in No. 71-1008

CHEMICAL TRANSPORTER, INC.,
Appellant in No. 71-1009

(D. C. No. 1844 in Admiralty)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ..... DISTRICT OF DELAWARE

Present: BIGGS, VAN DUSEN and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ..... District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 2, 1970, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

THOMAS F. QUINN
Clerk

February 15, 1972.

Costs taxed in favor of appellee as follows:

Brief for appellee $378.85

Certified as a true copy and issued in lieu of a formal mandate on April 10, 1972.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit.

APPENDIX E.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-1008 and 71-1009

MIRIAM GERTRUDE ANDREWS, Executrix of the Estate of RICHARD ANDREWS

v.

CHEMICAL CARRIERS, INC. and CHEMICAL TRANSPORTER, INC.

CHEMICAL CARRIERS, INC., Appellant in No. 71-1008
CHEMICAL TRANSPORTER, INC., Appellant in No. 71-1009

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and BIGGS, VAN DUSEN ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN and HUNTER, Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ FRANCIS L. VAN DUSEN
Judge

Dated: March 31, 1972.